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6 Attorneys for Third Parties  
THEODORE KRAMER and  
7 THOMAS SCARAMELLINO

8 SUPERIOR COURT OF CALIFORNIA  
9  
10 COUNTY OF SAN MATEO

11 **Six4Three**, a Delaware limited liability  
12 company,

13 Plaintiff;

14 v.

15 **Facebook, Inc.**, a Delaware corporation;  
16 **Mark Zuckerberg**, an individual;  
**Christopher Cox**, an individual; **Javier**  
17 **Olivan**, an individual; **Samuel Lessin**, an  
individual; **Michael Vernal**, an individual;  
18 **Ilya Sukhar**, an individual; and **Does 1-50**,  
inclusive,

19 Defendants.  
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**FILED**  
**SAN MATEO COUNTY**

MAR 25 2019

Clerk of the Superior Court

By  **DEPUTY CLERK**

Case No. CIV533328

Assigned for all purposes to Hon. V.  
Raymond Swope, Dep't 23

**DECLARATION OF JACK RUSSO IN SUPPORT  
OF OPPOSITION TO *EX PARTE* APPLICATION  
RE THOMAS SCARAMELLINO'S ADDRESS**

CIV533328  
EPD  
Ex Parte Declaration  
1726463



1 I, Jack Russo, declare under penalty of perjury as follows:

2 1. My name is Jack Russo. I am managing partner of Computerlaw Group LLP and  
3 counsel for third parties Theodore Kramer and Thomas Scaramellino. I am a member in good  
4 standing of the California State Bar and have been since I was admitted over thirty-five (35)  
5 years ago. I make the following statements based on my personal knowledge, and I believe them  
6 to be true. I could and would testify competently if called as a witness.

7 2. On March 18, 2019, Ms. Catherine Kim emailed me inquiring as to whether my  
8 office would provide service of subpoenas to my clients Mr. Kramer and Mr. Scaramellino, and  
9 to provide current addresses for both of the aforementioned for the subpoenas.

10 3. On March 20, 2019, I responded to Ms. Kim's inquiries with a letter requesting  
11 that Facebook answer five questions regarding the events in London in November 2018. I  
12 received no response from Counsel for Facebook. A true and correct copy of this letter is  
13 attached as **Exhibit 1**.

14 4. I directed my assistant to send this correspondence to Ms. Kim via email and  
15 request acknowledgement of receipt. No acknowledgment of receipt was received. A true and  
16 correct copy of this email is attached as **Exhibit 2**.

17 5. On March 22, 2019, I sent an email to Counsel for Defendant Joshua Lerner  
18 repeating Mr. Scaramellino's address and attaching the November 30, 2018 Order in which it is  
19 contained. A true and correct copy of this email is attached as **Exhibit 3**.

20 6. A true and correct copy of the November 30, 2018 Order containing Mr.  
21 Scaramellino's address is attached as **Exhibit 4**.

22 7. A true and correct copy of a Subpoena served by Facebook for the Deposition of  
23 Stuart Gross is attached as **Exhibit 5**.

24 8. A true and correct copy of a Subpoena served by Facebook for the Deposition of  
25 Thomas Scaramellino is attached as **Exhibit 6**.

26 9. A true and correct copy of a Subpoena served by Facebook for the Deposition of  
27 David Godkin is attached as **Exhibit 7**.

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1 I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct and that this declaration was entered into on March 22, 2019 in Palo  
3 Alto, California.

4   
5 Jack Russo  
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# **EXHIBIT 1**

# COMPUTERLAW GROUP LLP

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March 20, 2019

**Via Email**

Catherine Kim, Esq.  
Durie Tangri LLP  
217 Leidesdorff Street  
San Francisco, CA 94111  
ckim@durietangri.com

**Re:** Six4Three, LLC v. Facebook, Inc. et al.  
San Mateo Super. Ct. Case No. CIV 533328


Dear Ms. Kim:

We are in receipt of your request for confirmation regarding the addresses of our clients. Given the lack of mutuality in the approach you have taken so far, our clients have requested that before you ask us for any further mutual cooperation, you answer with *specifics* the five questions we posed to you over two months ago (see attached) and which remain unanswered. Once again, they are:

1. "What are the obligations of the Court where a House of Commons committee orders the release of documents in contravention to the Court's orders?"
2. "What are the procedures for Mr. Kramer, who was visiting the United Kingdom on business, to respond or object to the DCMS letter demand?"
3. Defendant has offices in London. Is Defendant subject to the jurisdiction of DCMS?"
4. "Has DCMS or other committee [*sic*] served a similar demand for unredacted copies of sealed documents on Defendant? If so, how has Defendant responded?"  
Nov. 20 Order ¶ 3-5.
5. And, of course, how is it that Section 16 of the Stipulated Protective Order does not afford a complete defense here given the notices that were indisputably given to Facebook and its legal counsel?

Despite your previous deflection that these items have been the "subject of extensive briefing before the Court," it was not until March 15 that Facebook first made the statement that it contacted DCMS prior to the November seizure of documents in London. It should be a simple matter to substantiate this claim in detail. Indeed, at the March 15 Hearing, Facebook persistently maintained to the Court that only "one side of the story" has been heard, and yet Facebook has continuously shrouded its own side of the story behind refusals to answer the above. Facebook cannot hope to prevail on any contempt without addressing these questions, and certainly cannot hope for cooperation without providing cooperation in kind. Santa Clara County Bar Assn. Rules of Professionalism § 3.  
Please advise.

Very truly yours,

  
Jack Russo

cc: Counsel of Record via Email  
*Enclosure*

# COMPUTERLAW GROUP LLP

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January 15, 2019

## Via Email

Sonal N. Mehta, Esq.  
217 Leidesdorff Street  
San Francisco, CA 94111  
smehta@durietangri.com

**Re:** Six4Three, LLC v. Facebook, Inc. et al.  
San Mateo Super. Ct. Case No. CIV533328

Dear Counsel:

You have asked for an “immediate response” to a letter that contains numerous factual assertions and assumptions that we simply cannot accept understanding the remedies that you are after with respect to two individuals who are not actual parties in this litigation and to the best of our knowledge have not been added as parties in any other aspect of this litigation. If we are wrong about the latter, can you advise us immediately on this and we will review your position promptly.

In the meantime, we remind you of the rulings made by the Court that no depositions or discovery were to occur in this case and that the procedures employed by Facebook to date were (and are) procedurally improper. See attached Transcript of Hearing dated December 17, 2018 at pages 4-7.

We also remind you of the list of procedural questions that the Court posed to Facebook and that to date have not been answered, including:

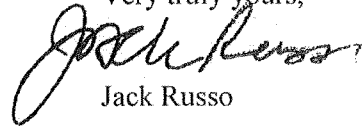
1. “What are the obligations of the Court where a House of Commons committee orders the release of documents in contravention to the Court’s orders?”
2. “What are the procedures for Mr. Kramer, who was visiting the United Kingdom on business, to respond or object to the DCMS letter demand?”
3. “Defendant has offices in London. Is Defendant subject to the jurisdiction of DCMS?”
4. “Has DCMS or other committee [*sic*] served a similar demand for unredacted copies of sealed documents on Defendant? If so, how has Defendant responded?”  
Nov. 20 Order ¶ 3-5.
5. And, of course, how is it that Section 16 of the Stipulated Protective Order does not afford a complete defense here given the notices that were indisputably given to Facebook and its legal counsel?

Sonal N. Mehta  
January 15, 2019  
Page 2

If your letter is effectively some type of "informal" notice of a contempt claim (criminal, civil, or otherwise) that you are asserting against either of our individual clients, would you please confirm that in writing and set forth in detail the petition that you have filed seeking a finding of such contempt and the specific relief that you are seeking against our clients. See Koehler v. Superior Court, 181 Cal.App.4th 1153 at 1169-1171, (2010). Failing these minimum procedural steps, we do not believe that you can reasonably request any discovery activities occur in this case without the appropriate filings and without providing answers to the above questions. Any motion by you that seeks to reverse or even modify the Court's existing no discovery orders should meet the requirements for reconsideration motions. See CCP Section 1008.

Please advise.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jack Russo", is written over the typed name.

Jack Russo

cc: Counsel of Record via Email

*Enclosure*

# **EXHIBIT 1**



1 MS. MEHTA: Good morning, Your Honor.  
2 Sonal Mehta, Josh Lerner, Laura Miller, Catherine Kim,  
3 and Zachary Abrahamson from Durie Tangri for Facebook.  
4 And also here are Paul Grewawal, vice-president, deputy  
5 general counsel for litigation from Facebook, and  
6 Natalie Nagle, associate general counsel for litigation  
7 at Facebook.

8 THE COURT: Good morning. I am going to have  
9 to make a disclosure. I don't think it's really that  
10 necessary, but I am going to do it, nevertheless.

11 I used to work for Mr. Sullivan's firm nearly  
12 30 years ago at Wilson, Elser, Moskowitz, Edelman &  
13 Dicker in San Francisco. I also used to work with  
14 Mr. Lassart at Ropers, Majeski, Kohn & Bentley over 20  
15 years ago. Any connections or affiliations are long  
16 past, and I hope that the parties will appreciate the  
17 disclosure.

18 And if there's no objection, we'll go forward.

19 All right. I just mentioned that in an  
20 abundance of caution.

21 This court has taken considerable time without  
22 the pressure of a briefing schedule and has looked at  
23 this over the weekend. And the court has reflected on  
24 the matters that have occurred in the recent weeks with  
25 regard to the violation of the court order and the  
26 subsequent release by the House of Commons and so forth.

1 And the court has, therefore, reconsidered certain  
2 orders it has previously issued with regard to the  
3 matters that are pressing. Therefore, in particular,  
4 the order reopening discovery for the limited purpose of  
5 investigating the breach of the court orders is vacated.

6 The reason for this is that I agree with  
7 Mr. Russo and, essentially, the inferences raised by  
8 Facebook, that there may be sufficient information to  
9 serve as a basis for a motion for terminating sanctions  
10 and for an application for order to show cause re:  
11 Contempt that's been issued by the parties.

12 Accordingly, the court is ordering the  
13 following: The forensic examiner should preserve and  
14 maintain the custody of the data collected pursuant to  
15 the court order.

16 The court orders preservation of that data,  
17 and nothing shall be disclosed to any of the parties  
18 until further order of the Court.

19 The forensic examiner shall not run any search  
20 terms at all, unless necessary for the preservation of  
21 the data, and such preservation, or necessity, shall  
22 only be pursuant to a court order.

23 Second, the court will not appoint a  
24 third-party discovery referee, nor will the court  
25 appoint a discovery referee for depositions.

26 The court further orders that there shall be

1 no depositions of lawyers in this case until further  
2 order of the Court, and there shall be no depositions of  
3 Mr. Kramer or Mr. Scaramellino until further court  
4 order.

5 This court believes that it is improper to  
6 compel attorneys to be subjected to deposition in view  
7 of the attorney-client privilege and the attorney work  
8 product doctrine protections.

9 In the absence of any further briefing on the  
10 motions and without the establishment of the two-step  
11 showing that is necessary under  
12 Evidence Code Section 956, that two-step showing, the  
13 prima facie case and the reasonable relationship between  
14 the communication and the crime of fraud has not been  
15 established, and we're not there.

16 The deposition of Mr. Scaramellino shall not  
17 go forward because he's in a bit of a gray area. Number  
18 one, he is a member of the legal team, and, presumably,  
19 everything that he would do would be imputed to the law  
20 firms that he works for; and, second, he's also an  
21 investor in Six4Three. So the deposition of Mr. Kramer  
22 shall not go forward, either, as I had said at the  
23 outset with the suspension of the discovery order having  
24 been made.

25 Now, Facebook has previously sought an  
26 expedited briefing on terminating sanctions and

1 contempt, which skips a number of procedural steps.  
2 This is improper. Therefore, if it chooses to do so,  
3 Facebook, may file its noticed motion for terminating  
4 sanctions pursuant to Code of Civil Procedure Section  
5 2023.030, with the ordinary briefing schedule pursuant  
6 to Code of Civil Procedure Section 1005(b).

7 Further, if it elects to do so, Facebook may  
8 make an application for an order to show cause re:  
9 Contempt with a properly prepared application and  
10 affidavit pursuant to Code of Civil Procedure  
11 Sections 1211 and 1211.5, pursuant to  
12 Code of Civil Procedure Section 1005(b) upon personal  
13 service as is required for any contempt citations, if  
14 Facebook elects to do so.

15 With regard to the certification of  
16 destruction, Facebook needs to serve the notice of entry  
17 of order regarding the return and/or destruction of  
18 confidential documents in order for that 48-hour period  
19 to begin.

20 MS. MEHTA: That was done on Friday,  
21 Your Honor.

22 THE COURT: Very well.

23 The motions for attorneys' fees shall go  
24 forward on January 11th, 2019, at nine o'clock a.m.

25 Facebook shall prepare the order based upon  
26 what I've just announced on the record.

# **EXHIBIT 2**

181 Cal.App.4th 1153

Court of Appeal, First District, Division 2, California.

In re Henry James KOEHLER, on Habeas Corpus.

No. A125012.

Feb. 5, 2010.

### Synopsis

**Background:** The Superior Court, San Mateo County, No. 071764, Susan I. Etezadi, J., initiated contempt proceeding against attorney with order to show cause, found attorney in contempt, and sentenced him to five days in jail. Attorney filed petition for writ of habeas corpus. The Court of Appeal issued order to show cause, and the Superior Court filed a return.

**Holdings:** The Court of Appeal, Richman, J., held that:

it was improper to initiate contempt proceeding without initiating affidavit;

personal service of contempt citation was required;

order and judgment of indirect contempt improperly omitted findings and evidence;

it was improper to impose multiple punitive contempt judgments for attorney's failure to pay discovery sanction; and

attorney's ability to pay was an element of the contempt, rather than an affirmative defense.

Reversed.

### Attorneys and Law Firms

**\*\*879** Henry James Koehler, in pro. per.; Barry M. Karl by appointment by the Court of Appeal, for Petitioner.

Meyers, Nave, Riback, Silver & Wilson, Joseph M. Quinn for Respondent.

Perkins Coie LLP, Kirk A. Dublin for Real Parties in Interest.

### Opinion

RICHMAN, J.

**\*1156** Petitioner Henry James Koehler became the attorney for wife in the midst of an acrimonious and bitterly contested divorce proceeding. Confidential documents that were the property of some third parties had been provided to wife, and she and petitioner refused to return them, even after a court order to do so. Third parties obtained an order awarding \$10,000 in discovery sanctions, which were not paid, and third parties initiated proceedings for indirect contempt. Petitioner resisted, represented by a court-appointed attorney, but without success, and was held in contempt and ordered to serve five days in jail, which he did. But he did not pay the \$10,000.

**\*\*880** Seven months later, apparently acting on its own and with no initiating affidavit, the superior court issued an order to show cause regarding contempt. Petitioner, again represented by court-appointed counsel, asserted jurisdictional, procedural, and substantive arguments in opposition. The superior court rejected the arguments, and ordered petitioner to serve another five days in jail, which he did. Less than two months later, again acting on its own and with no initiating affidavit, the superior court issued yet another order to show cause. Following a brief hearing at which petitioner appeared in propria persona, the court again held petitioner in contempt and ordered him to serve another five days in jail. This writ proceeding followed.

**\*1157** The leading expert on California judicial conduct has observed that “[t]he procedures for punishing direct, hybrid, and indirect contempt are different. Significant additional due process rights are involved in an indirect contempt that do not come into play in direct and hybrid contempt. For this reason, it is mandatory that judges be familiar with the procedures governing direct contempt. To invoke the power of contempt without knowing or learning the law is misconduct [citation].” (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 4.01, p. 154.) What happened here did not measure up to that law, not by a long shot. Treating the petition as one for prohibition, we grant it, and thus annul the contempt order, bringing an end to a most unfortunate chapter in this family law saga.

## BACKGROUND

Husband and wife were embroiled in a vigorously contested divorce case in the San Mateo County Superior Court, which began in August 2002. (See *In re Marriage of Papazian* (Apr. 22, 2009, A114961/A116750/A117270) [nonpub. opn.] 2009 WL 1076879.) Petitioner became wife's attorney in July 2005. According to petitioner, he became wife's attorney late in the proceedings, after wife's prior attorney "caved in" to husband's "fraud" in covering up his assets, and petitioner attempted to set aside various earlier-entered orders. Once petitioner entered the fray, numerous charges and countercharges flew between the sides, which included scathing correspondence between petitioner and husband (who at times was representing himself). The details of all that occurred are not before us, but suffice to say that what we know was particularly unpleasant.

During the course of discovery, documents containing certain confidential information belonging to Lucky Strike Farms, Inc., Papazian Properties Company, and Gilbert and Margaret Papazian (collectively, third parties)<sup>1</sup> had been provided to wife. On April 25, 2006, third parties filed for a protective order requiring, inter alia, the return of these documents; and on August 8, 2006, they obtained an order to that effect, ordering return of the documents by no later than August 18. The documents were not returned.

On October 17, 2006, third parties moved for an award of discovery sanctions under Code of Civil Procedure sections 2017.020, subdivision (b), and 2023.030, subdivision (a), and for mandatory injunctive relief. They also sought an award of \$17,270 from wife and petitioner, allegedly the attorney fees incurred in pursuing the protective order and in attempting to obtain the return of the documents.

**\*\*881 \*1158** A hearing on this motion was held on November 27, 2006, before the Honorable Clifford Cretan. After considering the arguments presented by both sides, Judge Cretan ordered both petitioner and wife to pay third parties sanctions in the amount of \$10,000. With petitioner acting as her attorney, wife filed an appeal from that order. Petitioner did not file an appeal on his own behalf. On April 22, 2009, we affirmed both that order and other orders entered by the trial court.

(*In re Marriage of Papazian*, *supra*, (A114961/A116750/A117270).)

Petitioner never paid the \$10,000 sanctions, and on May 30, 2007, third parties initiated contempt proceedings against him. Before turning to a discussion of what thereafter ensued, we set forth some fundamental principles regarding contempt, particularly indirect contempt.

## Some Fundamental Principles

We quoted above from Judge David Rothman, a recognized expert in the field of judicial conduct. Early in his lengthy chapter on contempt—a chapter replete with warnings and reminders about the necessity of judges' being especially vigilant in conducting contempt proceedings—Judge Rothman advises judges about "useful resources," including this: "For a useful and up-to-date reference on contempt and sanctions, see the Courtroom Control: Contempt and Sanctions, California Judges Benchguide (Revised 2006), produced by the Center for Judicial Education and Research of the Administrative Office of the Courts [(Benchguide)]...." (Rothman, *supra*, § 4.04, p. 157.)

The Benchguide is hardly the only readily available judicial resource regarding exercise of the contempt power. Another is the California Judges Benchbook: Civil Proceedings Before Trial (2d ed. 2008) (Benchbook), which "focuses on the judge's role," and provides "practical working tools to enable a judge to conduct proceedings fairly, correctly, and efficiently. [It is] written from the judge's point of view, giving the judge concrete advice on what to look for and how to respond." (Benchbook, Preface, p. v.) Chapter 17 of the Benchbook deals with sanctions and contempt.

Both the Benchguide and the Benchbook set forth in detail both the substantive law of contempt and the procedures to be followed; they also provide much practical advice. Illustrative is this from the Benchguide: "Civil contempt proceedings under CCP §§ 1209–1222, whether punitive or coercive, may arise out of either civil or criminal litigation. Furthermore, even though they are denominated civil, these proceedings are criminal in nature because of the penalties that a judge may impose. **\*1159** *People v. Gonzalez* (1996) 12 Cal.4th 804, 816 [50 Cal.Rptr.2d 74,

910 P.2d 1366]. The constitutional rights of the accused must be observed. See *Hicks v. Feiock* (1988) 485 U.S. 624, 632 [108 S.Ct. 1423, 99 L.Ed.2d 721] (guilt in *criminal* contempt proceeding must be proved beyond reasonable doubt); *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256 [265 Cal.Rptr. 144, 783 P.2d 731] (when there are punitive sanctions, guilt must be established beyond reasonable doubt). [Citations.]” (Benchguide, *supra*, § 3.25, p. 3–29.) The Benchbook is similar. (Benchbook, *supra*, § 17.77, pp. 439–440.)

Both books discuss the three types of contempt, direct, hybrid, and indirect, the last of which was invoked here against petitioner. “The facts supporting *indirect* contempt arise outside the judge's presence, requiring a more elaborate procedure to notify the person charged and to afford an opportunity to be heard. See CCP §§ 1211–1217; \*\*882 *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408 [42 Cal.Rptr. 441, 398 P.2d 777]. A common example is a party's disobedience of a judge's order.” (Benchbook, *supra*, § 17.78, p. 440.)

Both books also provide informative discussions of the difference between punitive and coercive forms of punishment. The Benchguide makes clear, for example, that “[i]n punitive proceedings, commonly referred to as ‘civil-punitive,’ the court may impose a fine not to exceed \$1000 and/or a term of imprisonment not to exceed five days to punish a party for each separate act of contempt. See CCP § 1218(a); *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 674 [119 Cal.Rptr.2d 376] (five-day sentence was appropriate punishment for attorney adjudged in contempt for filing false statement of disqualification under CCP § 170.1). See also CCP § 1218(b)–(c) (punishment for failure to comply with family court order). On what constitutes a separate act of contempt, see *Donovan v. Superior Court* (1952) 39 Cal.2d 848, 855 [250 P.2d 246] (four distinguishable violations of injunction warranted multiple fines); *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 786 [242 Cal.Rptr. 148] (contemner's repeated failures to turn over documents as ordered constituted single act of contempt). The test is whether there were separate insults to the court's authority, several of which may occur on the same day. *Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 621 [204 Cal.Rptr. 786] ... (multiple fines for separate violations of injunction occurring on different days.)” (Benchguide, *supra*, § 3.28, p. 3–30.)

“In coercive proceedings, the court uses imprisonment to compel performance of some act or duty required of a person that the person has the ability, but refuses, to perform, *e.g.*, to answer a question as a witness. CCP § 1219(a).... The court must specify the act to be performed in the warrant of commitment. See CCP § 1219(a); *Morelli v. Superior Court* (1969) 1 Cal.3d [328,] 332 [82 Cal.Rptr. 375, 461 P.2d 655]; *H.J. Heinz Co. v. Superior Court* (1954) 42 Cal.2d 164, 174 [266 P.2d 5]. [¶] JUDICIAL TIP: In selecting the appropriate punishment, the court should weigh the effect of any mitigating circumstances. [Citations.]” (Benchguide, *supra*, § 3.29, p. 3–31.)

Other available practice guides explain not only the general rules and procedures, but precisely what must be proven at an indirect contempt proceeding. For example, one leading practical treatise distills it this way, in bullet point fashion: “In indirect contempt proceedings based on disobedience of a prior court order, a valid judgment must meet ‘strict requirements.’ Each of the following must be established:

- Facts establishing court's *jurisdiction* (*e.g.*, personal service or subpoena, validity of court order allegedly violated, etc.);
- *Defendant's knowledge* of the order disobeyed;
- Defendant's *ability to comply*; and
- Defendant's *willful disobedience* of the order.”

(Wegner et al., Cal. Practice Guide (The Rutter Group 2009) § 12:432, p. 12–88.)

The other leading practical treatise lists the same four issues. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009), § 9:712, p. 9(II)–48.3.) And, later elaborating on the third issue, it says this: “Ability to comply is sometimes obvious, particularly where the violation is of a strictly prohibitory injunction. But in any case, it must be proved by competent evidence.” (Weil & Brown, *supra*, § 9:724, p. 9 (II)–48.8.) “The burden of proof is on the *moving party* to prove the respondent's ability to comply (rather than on the respondent to prove inability).” (*Id.* at § 9:724.1, p. (II)48.8.)



**\*\*883 The Contempt Proceedings**

As noted, third parties initiated contempt proceedings on May 30, 2007, by submitting an affidavit of facts allegedly constituting contempt. Represented by a major law firm, third parties filed an "Order to Show Cause and Affidavit for Contempt." The factual showing in the affidavit included a lengthy attachment and five exhibits, providing evidence of third parties' unsuccessful attempts to negotiate a settlement of the issue, and to recover the sanctions award.

On July 16, 2007, the matter came on for arraignment before Judge Cretan, the judge who had issued the sanction order. Petitioner appeared on his own **\*1161** behalf and requested the services of a public defender. Judge Cretan paused the proceeding to have petitioner fill out a financial statement, and then questioned petitioner concerning it. Petitioner acknowledged that he had social security income, but that that he received "very, very little" income from his legal practice and had been sick. Apparently satisfied with petitioner's inability to pay for counsel, Judge Cretan ruled that it would appoint a private defender<sup>2</sup> to represent petitioner, which he later did. Asked how he pled, petitioner reaffirmed he was making a special appearance, so Judge Cretan entered "a denial or not guilty plea on [petitioner's] behalf." This was Judge Cretan's last involvement in any aspect of any contempt proceeding.

Petitioner petitioned this court for a writ of mandate or prohibition on July 17, 2007. After full briefing, we denied that petition on August 17, 2007.

Third parties resumed the contempt proceedings on July 3, 2008, proceeding under Code of Civil Procedure sections 1209, subdivision (a)(5) and 1218, subdivision (a), and the matter came on for hearing on July 10, 2008. Third parties were represented by counsel, as was petitioner, by his court-appointed counsel. The hearing began with counsel for third parties adverting to an in-chambers discussion:

"There was a pending discussion before your Honor on the issue of ability to pay and whether that is an affirmative defense which Mr. Koehler has to prove or whether that is part of our case in chief. And I believe your Honor gave us her tentative thoughts in chambers on that." After brief colloquy, the court responded, "It's the

court's view, and I think I've indicated this in chambers, and we can certainly put all the arguments on the record, it is not your burden to prove that. That is an affirmative defense in the court's mind, and you will have plenty of opportunity to address that issue, Mr. Demeester. But it is an affirmative defense if presented by the citee, the defendant, or a lack of ability to pay. And then that becomes a different issue. So that's the court's view."

Third parties presented documents and testimony demonstrating that Judge Cretan had issued a valid order in November 2006, requiring petitioner to pay \$10,000 as a discovery sanction; that petitioner was aware of this order; and that he had made no payments in compliance with it.

Petitioner cited to a different order issued by Judge Cretan, this on December 6, 2006, requiring wife—and only wife—to pay \$10,000 in **\*1162** sanctions under Family Code section 271, arguing that that order recited an ambiguity that relieved him of his obligation under the November 2006 **\*\*884** order. Petitioner also argued that it was the burden of the moving parties to establish that he had an ability to pay the sanction, and that they failed to prove that ability or his willful disobedience of that order. The trial court ruled that the December 2006 order was irrelevant to the contempt proceedings, as it did not pertain to petitioner, and did not vacate or modify the November 2006 order.<sup>3</sup> Significantly, the trial court also ruled "that ability to pay is an affirmative defense that can be presented by defendant, and that has not been done here."

At the conclusion of the hearing, the trial court found petitioner in contempt for failing to comply with the November 2006 order. It then considered arguments regarding the appropriate punishment, found that a fine would not likely coerce petitioner into compliance (given that he had not paid any part of the sanction specified by the November 2006 order), and sentenced him to five days in jail, with a surrender date of August 23, 2008, and with a recommendation that he be able to complete his sentence through a work program in his home county, Riverside.

At some point, petitioner applied to the Riverside County sheriff's office to participate in a work release at their jail and on August 21, was advised to return on Tuesday, August 26, rather than August 23. In the mid-afternoon of August 25, 2008, the day before he was to return to jail, and representing himself, petitioner filed a belated petition

for writ of habeas corpus in this court, which we denied the next day. Petitioner served the five-day jail sentence.

On February 24, 2009, a second contempt proceeding was initiated via an "Order to Show Cause Re: Contempt." The order to show cause has no counsel of record, and is signed by the trial court; it is not under oath. The record does not indicate what caused this second contempt proceeding to be generated, and we assume the court generated it on its own accord.

The order to show cause is four short paragraphs, and begins, however imprecisely, as follows: "On November 27, 2006, discovery sanctions of \$10,000 payable to this court on or before January 30, 2007, were imposed against Henry James Koehler, counsel for Respondent in this matter, by the Honorable Clifford V. Cretan pursuant to Family Code section 271.<sup>[4]</sup> As of \*1163 February 24, 2009 those sanctions have not been paid." The fourth paragraph concludes with this: "Note that all of the elements of contempt were found true at the contempt proceedings against Henry James Koehler on July 10, 2008. Therefore, there is no need for an initiating affidavit in this new contempt proceeding. The factual findings made at the conclusion of the July 10, 2008 hearing have been substituted for an initiating affidavit for this new order to show cause re: contempt."

The contempt hearing was held on March 25, 2009, as ordered. There was no appearance on behalf of third parties. Petitioner was represented by new (apparently still court-appointed) counsel, who had substituted in and was "specially appearing ... for the purpose of contested [sic] jurisdiction of this hearing." Counsel challenged the court's jurisdiction on the \*\*885 basis that the reference to Family Code section 271 and the statement that sanctions were payable to the court were inaccuracies in the order to show cause, and that petitioner was never properly joined as a party. The trial court responded as follows:

"THE COURT: Well, I mean, Mr. Koehler knows we had a huge hearing on this where he was found in contempt. So if the court misstated that it was payable to this court or to Lucky Strikes Farm in any event, that's—that may just be—that doesn't affect these proceedings, counsel. [¶] He knows what the issue is before the court. He was ordered to pay a \$10,000 discovery sanction by the trial court. We had a hearing on it. He was found in contempt of court.

And he hasn't as yet paid that \$10,000. So that's why we are here today."

Petitioner's counsel responded that he believed "the need for accuracy in the order to show cause re contempt is jurisdictional," and then complained that petitioner was improperly joined in the case. After some colloquy about the joinder issue, the trial court said it would take a "brief recess and just look at the complete file that is in chambers." The court returned a short time later, and the following ensued:

"THE COURT: Very well. Thank you. The court was just in recess very briefly. [¶] Counselor, I was taking a look at the file, and unfortunately I think you are incorrect on both issues. According to the minutes of the court on November 27, 2006, the minutes of the court clearly say sanctions in the sum of \$10,000 dollars are imposed against Henry James Koehler per Family Code section 271 to be paid to the court on or before January 30, 2007. So that's as to the first issue.

"MR. CORDLE: I'm sorry, 271 is only against parties as a matter of law.

"THE COURT: I am just reading to you the exact language in the minutes which the court adopted in the re contempt."

\*1164 Two pages later the trial court affirmed that "we are two years and ... four months into that order where [petitioner] was ordered by Judge Cretan to pay \$10,000 in discovery sanctions pursuant to Family Code section 271 to be paid to the court...."

Petitioner's counsel pressed on, concluding that there was a "defective order" to show cause re contempt, and objected to "any order for contempt based on payment of 271 sanctions ... as such 271 sanctions are not enforceable against him as a matter of law."<sup>5</sup> It was all to no avail.

The trial court amended the order to show cause to reflect that the sanctions were payable to third parties. It then found that the elements of contempt were previously established at the July 10, 2008 hearing, and that petitioner had still refused to pay the sanctions award. The trial court again sentenced petitioner to another five days of confinement with a self-surrender date. Petitioner served that second five-day sentence in early April 2009.<sup>6</sup>

**\*\*886** On May 14, 2009, another “Order to Show Cause Re: Contempt” was filed, once again signed by the trial court. As before, the order to show cause appears to be generated by the court itself. As before, it is not under oath. As before, it was four short paragraphs. As before, it began—incredibly in light of all that transpired—by stating that the trial court had imposed the sanctions “pursuant to Family Code section 271.” And as before, it concludes with this: “Note that all of the elements of contempt were found true at the contempt proceedings against Henry James Koehler on July 10, 2008. Therefore, there is no need for an initiating affidavit in this new contempt proceeding. The factual findings made at the conclusion of the July 10, 2008 hearing have been substituted for an initiating affidavit for this new Order to Show Cause Re: Contempt.”

Petitioner filed opposition and on May 27, 2009, made a “special appearance” before the trial court, this time in propria persona. The trial court inquired as to whether petitioner had paid the \$10,000. Petitioner refused to answer, asserting his constitutional rights. Petitioner objected to the form of service of the notice of hearing, specifically noting that he had not been personally served. He argued that the matter should be continued to permit him to obtain legal representation and witnesses. And he also argued that the two previous sentences for contempt had been punitive, not coercive.

**\*1165** The trial court explained that the court mailed petitioner a notice of hearing, consistent with its past practice. It also stated that the elements of contempt were established at the July 10, 2008 hearing, and that the time had passed for him to challenge the validity of the November 2006 order. Petitioner stated that he was tendering to the court a motion to quash based on “triple jeopardy” and the running of the statute of limitations. The trial court rejected all this, and stated: “This is a continuing contempt for this court,” and again sentenced petitioner to five days in jail. The hearing lasted all of eleven minutes, and generated a transcript eight pages in length.

On May 29, 2009, petitioner filed in this court a petition for a writ of habeas corpus. That same day we issued a stay of the trial court's contempt order and a request for informal opposition. Our request was served on several parties, including third parties (as real parties in interest),

and the Attorney General, on whom we customarily serve all habeas corpus petitions. No opposition was filed, and on July 28, 2009, we issued an order requesting the trial court to show cause why the relief sought in the petition should not be granted. Following that order, on August 14, 2009, we received “San Mateo County Superior Court's Return” to the order to show cause, filed by a private law firm, not county counsel. We appointed counsel for petitioner, who filed a traverse, following which we heard oral argument.

## DISCUSSION

### Preliminary Matters

As noted, petitioner has filed a petition for habeas corpus. As also noted, the Superior Court has appeared on its own behalf. This state of affairs leads to two preliminary issues: (1) whether in light of petitioner's out-of-custody status he has filed the appropriate writ; and (2) whether the return has been filed by the proper party.

While habeas corpus is obviously the appropriate remedy for an imprisoned contemnor (see *In re Buckley* (1973) 10 Cal.3d 237, 259, 110 Cal.Rptr. 121, 514 P.2d 1201), petitioner is not imprisoned. **\*\*887** However, prohibition lies to determine whether a superior court has imposed an invalid contempt order (*Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 69, 159 Cal.Rptr. 280; *Hanson v. Superior Court* (2001) 91 Cal.App.4th 75, 80, 109 Cal.Rptr.2d 782; see generally *Bellas v. Superior Court* (2000) 85 Cal.App.4th 636, 653, 102 Cal.Rptr.2d 380), and we will proceed by treating the petition here as one for prohibition.

Turning to the return filed by the superior court, there is a real question whether it is proper, and the court's opposition properly before us. It **\*1166** has been held that “Absent issues which directly impact the efficient operation of the court or the court's budget, the respondent court is not justified in taking an adversary role in writ proceedings.” (*Howard Guntz Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 576, fn. 6, 105 Cal.Rptr.2d 896.) This is based on the principle that a superior court generally does not have standing to appear in this court to defend its own rulings. (See *Neblett v. Superior Court* (1948) 86 Cal.App.2d 64, 66–67, 194 P.2d 22 [annulling contempt order challenged by

petition for writ of certiorari but dismissing petition as to individual judge]; see also *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1066, fn. 4, 103 Cal.Rptr.2d 751, 16 P.3d 166; and 8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 166, pp. 1073–1074.)

“Although rare, respondent court may oppose the writ petition when: ‘(1) the real party in interest did not appear; and (2) “[t]he issue involved directly impacted the operations and procedures of the court or potentially imposed financial obligations which would directly affect the court’s operations.” ’ ” (*Settemire v. Superior Court* (2003) 105 Cal.App.4th 666, 669, 129 Cal.Rptr.2d 560.) While the setting here meets the first but not the second component of this exception, rather than request further briefing on these questions—and cause even further expense to the superior court—we follow the approach in *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 108 Cal.Rptr.2d 825, a judicial disqualification case. There, the court concluded that while the superior court lacked standing to defend itself, “because respondent court’s brief is of assistance to this court and because we recognize the impact of disqualification orders upon the court’s case management system, we will consider the court’s return as an amicus curiae brief filed in support of real parties in interest.” (*Id.* at p. 523, fn. 2, 108 Cal.Rptr.2d 825.)

We thus turn to the merits of the matter—and conclude that petitioner’s position is well taken.

### The Standard of Review

As our Supreme Court has often noted, “In the review of a contempt proceeding ‘the evidence, the *findings*, and the judgment are all to be strictly construed in favor of the accused [citation], and no intendments or presumptions can be indulged in aid of their sufficiency. [Citation.] If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled.’” (*Hotaling v. Superior Court* (1923) 191 Cal. 501, 506 [217 P. 73], *italics added*.)” (*Mitchell v. Superior Court, supra*, 49 Cal.3d at p. 1256, 265 Cal.Rptr. 144, 783 P.2d 731.) Thus, there is no presumption of regularity in contempt proceedings ( \*1167 *In re Wells* (1946) 29 Cal.2d 200, 201, 173 P.2d 811; *Powers v. Superior Court* (1967) 253 Cal.App.2d 617, 619, 61 Cal.Rptr. 433; *Petition of Mancini*

(1963) 215 Cal.App.2d 54, 56, 29 Cal.Rptr. 796), nothing can be implied in \*\*888 support of an adjudication of contempt (*In re Scroggin* (1951) 103 Cal.App.2d 281, 283, 229 P.2d 489), and the record must be strictly construed in favor of petitioner, the one found in contempt. (*Raiden v. Superior Court* (1949) 34 Cal.2d 83, 86, 206 P.2d 1081.)

### The Requisite Procedures Were Not Followed, the Applicable Law Was Not Applied

We begin with discussion of what occurred at the third hearing, on May 27, 2009, which began at 10:44 a.m. and was over by 10:55. Again, there was no appearance by third parties. Petitioner appeared, this time in propria persona. After satisfying itself that petitioner could hear,<sup>7</sup> the trial court started with this:

“THE COURT: Okay. Thank you, sir. Well, Mr. Koehler, you are before the court on an in re contempt for the third time for failure to pay a \$10,000 discovery sanction that was payable to Lucky Strike Farms, Inc. that was the order of the trial court on November 27, 2006; was to be paid by January 30, 2007.

“We had a hearing in this matter in July of 2008 and I brought you before the court twice before and sentenced you to county jail on two prior occasions. This is the third time I’ve brought you back before the court. Have you paid that \$10,000 discovery sanction, sir?

“THE DEFENDANT: Without counsel here obviously that would be a Fifth Amendment testimony matter. I am making a special appearance. I take it the court has gotten and read the motion to quash today, but my offer is and the court read it is that I’m willing to accept service because it wasn’t personally served. I would accept it today with the condition that I get the required 16-day court time under CCP 1005. Did the court get a chance to read that?

“THE COURT: Yes. The last time you were in court you had an attorney with you, that was Mr. Cordle and at the previous two times. We also mailed you the notice for hearing to appear before the court as with your attorney, which is the same thing we did this time, so this time you’re objecting that the court has to personally serve you is your position; is that correct, Mr. Koehler?

\*1168 “THE DEFENDANT: I believe that's the law. That's CCP 1016 is the *Cedars-Sinai [Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 100 Cal.Rptr.2d 320]* case, but you notice that on the last page of that, I've said that as an officer of the court, I'm not trying to hide and I'm more than willing to accept service of it today, personal service if I get in exchange for the required 16 court days that I would get anyway under a motion.

“THE COURT: Thank you, sir. The court is going to respectfully deny your request....

“In any event, the court has already conducted a hearing in this matter and found you in contempt of court for failure to abide by a ruling of the trial court back in 2006. Again, this is the third time you've been before the court. Very well, sir, is there anything else you'd like to say?

“THE DEFENDANT: Yes.... Clearly this is a third trial. It's a separate trial. It is not a continuing trial; it is a third one. The notice at any rate even if it had been served correctly on May 14, only gave me eight court days, this is the 8th \*889 court day; and therefore, I make my motion to have my 16 court days, which would continue this matter, I believe until June 15 so that I have the necessary notice and opportunity for obtaining counsel and obtaining witnesses and evidence and so on.

“THE COURT: Sir, I think you misunderstand the procedure before the court. We've already had a hearing on this matter and all of the elements of contempt were found true on July 10 of 2008. You had a hearing, you were represented by counsel, and the court found you in contempt; therefore, there is no need for an initial hearing or affidavit in these new contempt proceedings. We don't have hearing after hearing on the same facts, sir. You were found guilty of contempt for failure to pay a \$10,000 discovery sanction as an attorney of law, so you misunderstand the law, sir. It would make no sense to have a hearing each and every time on the very same issue. We have done that already....

“Very well. Your objections are noted for the record, sir, and the court is going to sentence you to five days in the county jail....

“THE DEFENDANT: May I?

“THE COURT: We've been down this road two times before, sir, and it is regretful that the court continues to have to do this. The court takes no joy in doing this; however, this is the only way that the court can enforce its orders in this matter.”

\*1169 A minute order was issued that day which provided in its entirety as follows: “Attorney Koehler argues that he was not properly served in this matter. He requests a continuance and offers to accept service in court today. [¶] Attorney Koehler's Motion to Continue is DENIED. [¶] THE COURT SENTENCES HENRY JAMES KOEHLER FOR FAILURE TO PAY THE \$10,000.00 COURT ORDERED SANCTION OF 11/27/06 AS FOLLOWS: [¶] SERVE 5 DAYS IN COUNTY JAIL. [¶] SURRENDER TO SAN MATEO COUNTY JAIL ON 6/2/09 AT 10AM. [¶] SHERIFF'S WORK PROGRAM IS NOT RECOMMENDED.” That same day the court filed an order remanding petitioner into custody.

The third contempt proceeding was improper in at least four particulars.

First, it was not properly begun. It has long been the rule that the filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding. (See *Warner v. Superior Court* (1954) 126 Cal.App.2d 821, 824, 273 P.2d 89.) As our Supreme Court put it in *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 532, 247 Cal.Rptr. 378, 754 P.2d 724, “[Code of Civil Procedure] section 1211 requires that an affidavit be presented to the judge reciting the facts constituting contempt. No such affidavit was presented.... Thus, the Commission was correct in concluding that Judge Ryan's contempt order was procedurally invalid.” In short, indirect contempt requires there be an initiating affidavit, and without one any contempt order is void. (*In re Cowan* (1991) 230 Cal.App.3d 1281, 1286–1287, 281 Cal.Rptr. 740.)

Second, a contempt citation must be served personally. Service of an order to show cause to bring a party into contempt is insufficient if made by mail on the party's attorney of record. This was the express holding of *Cedars-Sinai Imaging Medical Group v. Superior Court*, *supra*, 83 Cal.App.4th at p. 1287, fn. 6, 100 Cal.Rptr.2d 320—the very case petitioner cited to the trial court.

Third, as the Benchbook states the rule, “Because the contemptuous act **\*\*890** occurred outside the judge’s presence, a valid order and judgment of indirect contempt must cover the following elements: the issuance of an order, the contemner’s knowledge of the order, the contemner’s ability to obey it, and the contemner’s willful disobedience. See *In re Jones* (1975) 47 Cal.App.3d 879, 881 [120 Cal.Rptr. 914]. The order and judgment must state evidentiary facts supporting a finding of each of these elements, except that it need not state such facts in support of the finding of willfulness, which may be inferred from the circumstances.” (Benchbook, § 17.112, p. 458.) The minute order here falls short in all respects.

Fourth, the trial court responded to petitioner’s argument of “triple jeopardy” by asserting that each day that petitioner had not paid the \$10,000 **\*1170** was “technically ... a new contempt.” This was wrong. The preclusion of multiple punishment in Penal Code section 654 applies in civil contempt, to the extent the punishment is punitive in nature. (See *Mitchell v. Superior Court*, *supra*, 49 Cal.3d at p. 1246, 265 Cal.Rptr. 144, 783 P.2d 731; *Conn v. Superior Court*, *supra*, 196 Cal.App.3d at p. 786, 242 Cal.Rptr. 148; *In re Farr* (1976) 64 Cal.App.3d 605, 614–615, 134 Cal.Rptr. 595.) *Conn* is on point. There, while upholding the contempt as proper, the court held it was improper to impose multiple punishments for what was basically a single disobedience, although continuing in nature. And the disobedience there? A refusal to return privileged documents. The test is whether there are “ ‘separate insults to the authority of the court, not whether the insults happened to occur on the same or different days.’ ” (*Conn*, *supra*, 196 Cal.App.3d at p. 786, 242 Cal.Rptr. 148, citing *Reliable Enterprises, Inc. v. Superior Court*, *supra*, 158 Cal.App.3d at p. 621, 204 Cal.Rptr. 786.) In sum and in short, the third contempt was improper, both procedurally and substantively.

Petitioner has, as noted, already served two five-day sentences, so any claim as to the impropriety of the first or second contempt proceeding is not before us. However, since the order to show cause involved in the third contempt—however inadequate it was—referred to the earlier proceedings, and because the brief hearing on the third contempt referred to earlier proceedings, any defect in any earlier proceeding is pertinent. And defect there was, especially in the proof required.

As noted, from the outset petitioner’s counsel took the position that third parties had the burden to prove that petitioner had the ability to pay. Third parties’ position was that inability to pay was an “affirmative defense.” The trial court expressly agreed. The law is contrary. (*Mitchell v. Superior Court*, *supra*, 49 Cal.3d at p. 1256, 265 Cal.Rptr. 144, 783 P.2d 731; *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1245, 80 Cal.Rptr.2d 891; *In re Cassil* (1995) 37 Cal.App.4th 1081, 1088–1089, 44 Cal.Rptr.2d 267.)<sup>8</sup> Thus, there was no substantial evidence that petitioner had the ability to comply with the order, so the contempt “must be reversed and annulled.” (*In re Cassil*, *supra*, 37 Cal.App.4th at pp. 1088–1089, 44 Cal.Rptr.2d 267.)

Not only did the trial court hold petitioner in contempt, but on May 27, 2009, it also caused a discipline referral form to be submitted to the State Bar.<sup>9</sup> Despite all **\*\*891** that had occurred, the form inexplicably stated that the referral was “for a” \$10,000 discovery sanction imposed against Mr. Koehler on November 27, 2006, pursuant to [Family Code] section 271.” And, the form said, the “nature of the criminal offense” was petitioner’s “contempt of **\*1171** court failed to comply with November 27, 2006 court order.” This referral apparently had a drastic effect, as at oral argument his counsel represented that petitioner has been “disbarred.”<sup>10</sup>

### Some Closing Observations

One of the many inexplicable aspects of this case is how a person deemed sufficiently impecunious to be entitled to appointed counsel can be held in contempt and incarcerated for failure to pay a \$10,000 fine—indeed, on the trial court’s theory, repeatedly so held and repeatedly incarcerated, apparently ad infinitum.

Quoting various sources, Judge Rothman emphasizes the “importance [to judges] of knowing the law of contempt,” saying this: “The Commission on Judicial Performance has stated that, “[b]efore sending a person to jail for contempt, or imposing a fine, judges are required to provide due process of law, including strict adherence to the procedural requirements contained in the Code of Civil Procedure. Ignorance of those procedures is not a mitigating but an aggravating factor. [¶] A judge, therefore, is obliged to know proper contempt procedures.

'The contempt power, which permits a single official to deprive a citizen of his [or her] fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation, must be used with great prudence and caution. It is essential that judges know and follow proper procedures in exercising this power, which has been called a court's 'ultimate weapon.' " (Rothman, *supra*, § 4.03 p. 156, fns. omitted.) To put Judge Rothman's strong admonitions in the vernacular, any trial court exercising the "ultimate weapon" must be absolutely certain that it not only knows the law, but that it has also dotted all the *i*'s and crossed all the *t*'s. What happened here was a far cry.

Beyond what we gleaned from the correspondence mentioned above, we do not know much of what occurred in the course of petitioner's representation of wife below. Maybe petitioner was difficult to deal with. Certainly he ignored the \$10,000 sanction (assuming he was able to pay

it). Perhaps he was even contumacious. But whatever the characterization of petitioner's conduct, he, like all others, is entitled to the due process the law requires. This he did not get.

### \*1172 DISPOSITION

Petitioner's petition is treated as one for prohibition, and is granted, and the order of contempt is reversed and annulled.

We concur: KLINE, P.J., and HAERLE, J.

### All Citations

181 Cal.App.4th 1153, 104 Cal.Rptr.3d 877, 10 Cal. Daily Op. Serv. 1737, 2010 Daily Journal D.A.R. 2053

### Footnotes

- 1 Papazian Properties Company is owned by Lucky Strike Farms, Inc., Papazian Investment Company and Gilbert and Margaret Papazian, who are the parents of husband in the divorce case.
- 2 San Mateo County does not have a public defender. Making the determination that petitioner was entitled to court-appointed counsel, Judge Cretan necessarily determined that petitioner was not "financially able to employ counsel and qualifie[d] for the services" of the public defender. (See Gov.Code, § 27707.)
- 3 In our April 2009 affirmance of the trial court's three orders in the dissolution action, we agreed with the ruling of the trial court and specifically stated that the December 2006 order was either mistakenly filed or incorrectly prepared by the trial court, and directed it to correct that order to conform to the November 2006 order.
- 4 The Family Code section was not involved, as the trial court had already ruled.
- 5 It is not disputed that Family Code section 271 sanctions can be assessed only against a party.
- 6 On May 27, 2009, after he had served the five days in jail, petitioner filed in this court a petition for habeas corpus. We summarily denied the petition the next day, as we lacked jurisdiction. (See *Maleng v. Cook* (1989) 490 U.S. 488, 491–493, 109 S.Ct. 1923, 104 L.Ed.2d 540 [habeas corpus does not lie for petitioner who is no longer in actual or constructive custody].)
- 7 Petitioner is 75 years old, has a hearing impairment, and frequently appears in a wheelchair in his court appearances.
- 8 An exception to this is in an order for child support, where inability to pay is an affirmative defense. (*In re Ivey* (2000) 85 Cal.App.4th 793, 798, 102 Cal.Rptr.2d 447.)
- 9 The form was actually submitted by her courtroom clerk, with the trial court listed as the person to be contacted for further information.
- 10 The official State Bar website lists petitioner's status as "Not Eligible to Practice Law." (State Bar of California, Attorney Search, at < <http://www.calbar.ca.gov/state/calbar/calbar—home.jsp> > [as of Feb. 4, 2010].)

## **EXHIBIT 2**



## Ian Buckman

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**From:** Ian Buckman  
**Sent:** Wednesday, March 20, 2019 10:22 PM  
**To:** 'CKim@durietangri.com'; 'SERVICE-SIX4THREE@durietangri.com'; 'jlerner@durietangri.com'; 'SMehra@durietangri.com'; 'LMiller@durietangri.com'; 'zabrahamson@durietangri.com'; 'sgross@grosskleinlaw.com'; 'bklein@grosskleinlaw.com'; 'godkin@birnbaumgodkin.com'; 'kruzer@birnbaumgodkin.com'; 'donald.sullivan@wilsonelser.com'; 'sbolotin@morrisonmahoney.com'; 'tmazzucco@mpbf.com'; 'jleveroni@mpbf.com'; 'JMurphy@MPBF.com'  
**Cc:** Jack Russo; Chris Sargent  
**Subject:** Re: Six4Three, LLC v. Facebook, Inc., et al. (Case No. CIV533328)  
**Attachments:** 2019.03.20 Ltr Resp. to C.Kim re Unanswered Questions.pdf

Dear Ms. Kim,

Please find the attached correspondence from Jack Russo regarding your earlier correspondence involving discovery. Please let me know if you have any issues accessing the document, and please confirm receipt of this correspondence at your earliest convenience.

Best Regards,

**Ian Buckman**

Legal Assistant, Computerlaw Group LLP

[ibuckman@computerlaw.com](mailto:ibuckman@computerlaw.com)

(650) 300-4346 direct | 650-327-9800 main

# **EXHIBIT 3**

**Ian Buckman**

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**From:** Jack Russo  
**Sent:** Friday, March 22, 2019 1:51 PM  
**To:** jlerner@durietangri.com  
**Cc:** JMurphy@mpbf.com  
**Subject:** 2018.11.30 Order  
**Attachments:** 2018.11.30 SCARA Order Deny. FB Ex Parte Appl. re Briefing on Contempt & Sanctions.pdf; ATT00001.htm

Why are your associates so multiplying litigation? I don't see that the Court will take kindly to the waste of its time and ex parte process when Mr. Scaramellino's address is in the public records INCLUDING IN THIS CASE:

"2674 State Route 42, Forestburgh, NY 12777"

See November 30, 2018 Order at p.4

Please cease and cause your firm to cease the repeated ex parte harassment.

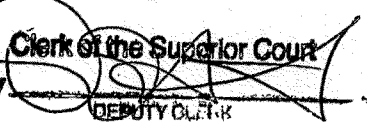
We note too that no depositions were to be scheduled until after the April 26, 2019 Court case management conference so doing so in advance is a further abuse of process.

All rights are reserved; continued abuse will be brought to the attention of the Court.

# **EXHIBIT 4**

**FILED**  
**SAN MATEO COUNTY**

NOV 30 2018

Clerk of the Superior Court  
By   
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE LLC,

Plaintiff,

vs.

FACEBOOK INC., et al.

Defendants.

Case No. CIV533328

**ORDER DENYING DEFENDANT  
FACEBOOK, INC'S EX PARTE  
APPLICATION**

Assigned for All Purposes to  
Hon. V. Raymond Swope, Dept. 23

Hearing Date: Friday, November 30, 2018  
Hearing Time: 2:00 p.m..  
Dept.: 23

Action Filed: April 10, 2015

On November 19, 2018, the Court set a briefing schedule on defendant FACEBOOK, INC.'s ("Defendant" or "Facebook") ex parte application for expedited briefing on a motion for sanctions and contempt ("Defendant's Ex Parte") by email.

On November 20, 2018, the Court issued an Order for Briefing and Staying Submission of Unredacted Copies of Sealed Documents ("11/20 Order").

On November 26, 2018, the Court received Plaintiff SIX4THREE, LLC's ("Plaintiff" or "Six4Three") Response to the 11/20 Order at 11:35 a.m., Defendant's Ex Parte at 11:55 a.m., and Plaintiff's "Limited Response" to Defendant's Ex Parte at 4:46 p.m.

On November 27, 2018, the Court issued an Order and Notice of Hearing setting a hearing for November 30, 2018 at 2:00 p.m.

On November 28, 2018, the Court received Defendant's Response to the 11/20 Order at 7:02 p.m. and Plaintiff's Response to Defendant's Ex Parte at 7:06 p.m.



1 On November 29, 2018 at 2:31 p.m., Mr. Godkin sent a letter to both the Court and the  
2 parties ("11/29 Letter"), a copy of which is attached as **Exhibit A**.

3 IT IS HEREBY ORDERED as follows:

4 Defendant's Ex Parte is GRANTED, IN PART, AND DENIED, WITHOUT PREJUDICE,  
5 IN PART.

6 Defendant's ex parte request for expedited briefing and hearing on terminating sanctions and  
7 contempt sanctions is procedurally improper. Notice must be given. (Code Civ. Proc. § 2023.030  
8 ("the court, after notice to any affected party, person, or attorney, and after opportunity for hearing,  
9 may impose . . . sanctions against anyone engaging in conduct that is a misuse of the discovery  
10 process").) "Discovery sanctions may not be ordered ex parte, and an order purporting to do so is  
11 void." (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208.)

12 Defendant's ex parte request for expedited requests for document production is procedurally  
13 improper. No requests have been served on Plaintiff and the relief requested is premature.  
14 Furthermore, a motion is required. (Code Civ. Proc. § 2031.260, subd (a) (response deadline to  
15 requests for production is 30 days "unless on motion of the party making the demand, the court has  
16 shortened the time for response"). See also Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial  
17 (Rutter, Jun. 2018 Update) ¶ 9:349.) However, the court may issue an order shortening time pursuant  
18 to ex parte application on any such motion. (Weil & Brown, *supra*, at ¶ 9:347.)

19 Defendant's ex parte request to shorten notices of deposition is GRANTED to five days upon  
20 electronic service or personal delivery. (Code Civ. Proc. § 2025.270, subd. (d). See also Weil &  
21 Brown, *supra*, at ¶ 8:493.3.) Notices of deposition on parties may include requests for production.  
22 (Code Civ. Proc. § 2025.220, subd. (a)(4).)

23 Defendant's ex parte request to require the depositions of Plaintiff's *pro hac vice* counsel in  
24 San Mateo County is DENIED. (Code Civ. Proc. § 2025.250, subd. (a).)

25 In ruling on the ex parte application, the Court takes no position on the issues of the waiver  
26 of attorney-client privilege or the taking of depositions of any of Plaintiff's counsel as that issue is  
27 not ripe for review. Notices of deposition, requests for production, and objections have yet to be  
28 served.

1 The Court immediately orders that Plaintiff's counsel Stuart Gross of Gross & Klein shall  
2 unmark all folders and files marked for deletion in the Six4Three Dropbox account to preserve all  
3 files and folders. After unmarking, Mr. Gross shall then provide the administrator access log in and  
4 password to the third party forensic examiner agreed to on the record, **Eric Friedberg of Stroz**  
5 **Friedberg, or his agents, at (212) 981-6536 (office), (914) 329-9371 (mobile), or**  
6 **efriedberg@strozfriedberg.com (e-mail) ("Forensic Examiner")**. Upon receipt of said  
7 information, the Court immediately orders the Forensic Examiner to maintain chain of custody, take  
8 all measures to restrict access to, and preserve the data from the Six4Three dropbox account,  
9 including but not limited to imaging, for preservation of the evidence until further order of the Court.

10 The Court immediately orders that Mr. Theodore Kramer shall not open or access, in any  
11 way, the laptop he used to access Defendant's Highly Confidential Documents and transfer those  
12 files to the USB thumb-drive to Parliament until further order of the Court. (Weil & Brown, *supra*,  
13 at ¶ 8:19:12. See Def. Response to 11/20 Order, filed Nov. 28, 2018, p. 7:13-15.)

14 The Court immediately orders that Mr. Kramer shall not open, access, modify, or delete any  
15 storage or back-up devices for his laptop, whether in physical format ("physical storage devices")  
16 (i.e. USB thumb-drive) or in the cloud ("cloud storage").

17 **Mr. Kramer, to be accompanied by Plaintiffs' counsel David Godkin and Stuart Gross,**  
18 **shall make available for pick up at Gross & Klein, the Embarcadero, Pier 9, Suite 100, San**  
19 **Francisco, CA 94111 - the laptop, all physical storage devices, identify in writing all cloud**  
20 **storage, and provide any log-in information necessary for the full and complete access to all**  
21 **data in the aforementioned to the Forensic Examiner no later than Friday, November 30, 2018**  
22 **at 9 pm.** Defendant's counsel are permitted to be present for this pick up. The Forensic Examiner  
23 shall pick up, maintain chain of custody, take all measures to restrict access to, and preserve the data  
24 on the laptop, all physical storage devices, and cloud storage, including but not limited to imaging,  
25 for preservation of the evidence until further order of the Court.

26 **Mr. Kramer, to be accompanied by Mr. Godkin and Mr. Gross, shall make his mobile**  
27 **devices available and provide any log in information necessary for the full and complete access**  
28 **for preservation of data on those devices to the Forensic Examiner at Gross & Klein no later**

1 **than Friday, November 30, 2018 at 9 pm.** The Forensic Examiner shall take all measures to  
2 preserve the data on the mobile devices, including but not limited to imaging, for preservation of  
3 the evidence until further order of the Court. Defendant's counsel are permitted to be present for  
4 this data preservation by the Forensic Examiner. Upon completion of the imaging of the mobile  
5 devices, the Forensic Examiner shall return the mobile devices to Mr. Kramer.

6 The Court orders Mr. Kramer shall not delete any data from his mobile devices, whatsoever,  
7 until further order of the Court. If any of his mobile devices are set to automatically delete any data,  
8 the Court instructs Mr. Kramer to turn off that setting.

9 The Court immediately orders that Mr. Thomas Scaramellino, who is a member of  
10 Six4Three's legal team, shall not open or access, in any way, the laptop or computer he used to  
11 access Six4Three's dropbox and that Mr. Scaramellino shall not open, access, modify, or delete any  
12 physical storage devices or cloud storage for his laptop or computer.

13 **Mr. Scaramellino shall make available for pick up at the address provided by Mr.**  
14 **Godkin, 2674 State Route 42, Forestburgh, NY 12777 - the laptop or computer, his physical**  
15 **storage devices, and identify in writing all cloud storage and provide any log in information**  
16 **necessary for the full and complete access to all data in the aforementioned to the Forensic**  
17 **Examiner no later than Saturday, December 1, 2018 at 12 pm.** The Forensic Examiner shall pick  
18 up, maintain chain of custody, take all measures to restrict access to, and preserve the data on the  
19 laptop or computer, Mr. Scaramellino's physical storage devices, and Mr. Scaramellino's cloud  
20 storage, including but not limited to imaging, for preservation of the evidence until further order of  
21 the Court.

22 **The Court orders that the Forensic Examiner shall not disclose any data preserved or**  
23 **collected in this action to any party, non-party, person or entity, until further order of the**  
24 **Court.**

25 Mr. Kramer shall authenticate and produce full copies of the emails and attachments he  
26 produced as exhibits to his declaration filed in support of Plaintiff's Brief in Response to the 11/20  
27 Order, filed November 26, 2018, to Defendant **no later than December 1, 2018 at 9 a.m.** This shall  
28 include, but is not limited, to the three attachments in Exhibit 1 ("Summary of Complaint.pdf,"



1 "FILED Corrected Opp to Individual Defendants Anti-SLAPP.pdf," "Requests for Production-  
2 six4three.pdf") and text identified as hidden by "[Quoted text hidden]" at Exhibit 2, p. 2 and Exhibit  
3 5, p. 2. (See Def. Response to 11/20 Order, *supra*, at p. 6:20-21.) **These emails and attachments**  
4 **shall be bates-stamped for ease of future reference for both the parties and the Court.**

5 The provision for preservation of evidence in the 11/20 Order remains in effect and is  
6 ordered extended to apply to any storage or back-up devices for any mobile devices, whether in  
7 physical format or in the cloud (i.e. iCloud). (11/20 Order, *supra*, at p. 2:21 – 3:3.)

8 Good cause appears to order preservation of the aforementioned based on Mr. Kramer's  
9 admitted actions, the cloud cast by Plaintiff counsel's change in narrative in the 11/29 Letter,  
10 which is not supported by competent evidence (see 11/20 Order, ¶ 6), Plaintiff's counsel's assertion  
11 that "it does not appear that Mr. Kramer's deletion of local copies of the documents from his  
12 computer would affect any electronic evidence of his provision of documents, if any existed. It  
13 appears that this information, if it existed, would be contained in the system log of his laptop."  
14 (11/29 Letter, p. 2.), Mr. Kramer's admission he "[does] not recall the exact files [he] transferred"  
15 (Kramer Dec. ISO Pl. Response to 11/20 Order, filed Nov. 26, 2018, p. 5:23-25), and for the  
16 matters discussed on the record.

17 For discovery disputes, the parties are reminded of the discovery procedures set forth in CM  
18 Order no. 1, paragraph 11. (See CM Order no. 14, ¶ 6.) Any request for a discovery conference shall  
19 be delivered to Department 23 both electronically and in physical form.

20 Plaintiff's counsel shall all remain in this action until further order of the Court.

21 Mr. Godkin shall immediately provide a copy of this order to Mr. Scaramellino upon receipt.

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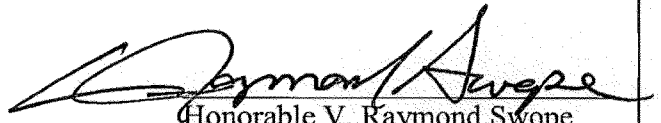
27 ///

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1           Lastly, the Court finds that although the summary of facts presented by Defendant in its Ex  
2 Parte and Response to the 11/20 Order is compelling, it is not in affidavit form. (Code Civ. Proc.  
3 § 1211, subd. (a). See Ex Parte, *supra*, at p. 2:24 -7:20; Def. Response to 11/20 Order, *supra*, at p.  
4 1:10 – 4:5, 5:19 – 6:8, 9:3 – 10:5, 10:16 – 11:14.)

5  
6 IT IS SO ORDERED.

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8 DATED: November 30, 2018

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11 Honorable V. Raymond Swope  
12 Judge of the Superior Court  
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## **Exhibit A**



David S. Godkin  
Direct Dial: (617) 307-6110  
godkin@birnbaumgodkin.com

November 29, 2018

**BY EMAIL TO COMPLEXCIVIL@SANMATEOCOURT.ORG**

The Honorable Judge Raymond V. Swope  
Superior Court of California, County of San Mateo  
Department 23, Courtroom 8A  
400 County Center  
Redwood City, CA 94063

Re: *Six4Three, LLC v. Facebook, Inc. et al*  
Case No. CIV 533328

Dear Honorable Judge Raymond V. Swope,

We write, in advance of the November 30, 2018 hearing, to preliminarily address the following statement from your November 27, 2018 Order: "Mr. Kramer admits he . . . destroyed evidence of the transferred files by deleting all documents from his Dropbox account on the advice of counsel."

We never instructed Mr. Kramer or anyone else to destroy any evidence, we would never give that instruction, and we do not believe that any evidence has been destroyed.

We look forward to answering questions of the Court concerning this matter tomorrow, but in advance would like to provide some background that could assist such questioning.

Before November 19, 2018, the date on which the U.K. Parliament DCMS Committee served its first Order on Mr. Kramer, we did not know that Mr. Kramer was in London.

On the morning of November 20, 2018, we further discovered that a member of Six4Three's legal team, Thomas Scaramellino, had previously placed unredacted (nonpublic) pleadings and exhibits in a folder on a Dropbox account owned by Six4Three (the "Six4Three Dropbox Account") that Mr. Kramer could access. Mr. Kramer should not have had access to the folder. We therefore took immediate steps to ensure that Mr. Kramer could not access folders on the Six4Three Dropbox Account to which he was not permitted access under the Protective Order. We immediately instructed Mr. Scaramellino to move any folder(s) that contained highly confidential documents from the Six4Three Dropbox Account to a location that was established by Mr. Gross on his



firm's cloud file system.<sup>1</sup> The purpose of doing so was to cure the recently discovered breach of the Protective Order and to prevent any possible misuse of the documents. We did not intend to destroy evidence, and do not believe that any evidence was destroyed.

We are not aware of any readily accessible solution that allows for the automated transfer of files from a Dropbox account to a location on the system that Mr. Gross's firm uses.<sup>2</sup> Thus, the method of transfer used was to have Mr. Scaramellino transfer a local copy of the files that had been saved on his computer to the newly created location to which Mr. Kramer had no access. On November 21, 2018, we understood this transfer had been completed.<sup>3</sup>

We learned for the first time on November 23, 2018 that Mr. Kramer had provided confidential and highly confidential documents to the U.K. Parliament on November 21, 2018. This was also the first time that we learned that Mr. Kramer had the Six4Three Dropbox Account set up to sync its contents—including the folder(s) containing the documents in question that Mr. Kramer was not permitted to access—to the laptop that he had with him. This is referred to as a "local copy" of folders<sup>4</sup>. We were therefore concerned that Mr. Kramer still had access to the local copy of folders that he was not permitted to have on his laptop. We therefore took steps intended to remove the local copy from Mr. Kramer's laptop, and so we instructed Mr. Kramer to delete the local copy of the files and prevent any further access by Mr. Kramer to Defendants' confidential files. This instruction was not intended to destroy evidence, but to safeguard Facebook's confidential information from further disclosure.

We do not believe any evidence has been destroyed but remains readily accessible. We understood, at the time, that all of the confidential documents in the Six4Three Dropbox account that Mr. Kramer should not have been able to access had been by then transferred to the new location that Mr. Kramer could not access. We also understood that a local copy of all of the files was located on Mr. Scaramellino's computer, which was identical to the files that had been on Mr. Kramer's computer. Thus, to prevent the possibility of any further disclosures by Mr. Kramer and stop the continuing violation of the Protective Order, resulting from Mr. Kramer's access to the

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<sup>1</sup> Mr. Kramer has testified that he provided the documents in question to the U.K. Parliament the next day, November 21, 2018, and there does not appear to be any dispute in this regard.

<sup>2</sup> To our knowledge the automated solutions that exist to accomplish such a transfer are at a very high enterprise level, meaning they are intended to facilitate the transfer of all of the files of a significantly-sized business from one system to another.

<sup>3</sup> We discovered later that the "drag and drop" method that Mr. Scaramellino had used to effect the transfer—while appearing to him to have accomplished the transfer on November 21, 2018—had not done so. Thus, he used a different method that resulted in the transfer being completed on November 27, 2018.

<sup>4</sup> Dropbox's syncing capability allows users to choose to have copies of documents that are saved on Dropbox's servers saved to the users' local computers. The service will then automatically update all of the copies of the documents (including those saved on Dropbox's servers and those saved on users' local computers).

Honorable Raymond J. Swope  
November 29, 2018



documents, we confirmed with him that he no longer has any copies of confidential documents on his computer and did not have access to such documents via the Six4Three Dropbox Account. Again, this was done in no way with the intention to have him destroy any evidence of anything. It was done to put him in compliance with the Protective Order, which prohibited Mr. Kramer from having access to the documents in question, and to prevent the possibility of any further violation of the Protective Order or the Court's other Orders.

Regarding evidence of what documents Mr. Kramer provided to the U.K. Parliament, it would appear that such evidence would come principally in the form of testimony from Mr. Kramer and the persons to whom the documents were provided. We do not have the technical expertise to state for sure; however, it does not appear that Mr. Kramer's deletion of local copies of the documents from his computer would affect any electronic evidence of his provision of documents, if any existed. It appears that this information, if it existed, would be contained in the system log of his laptop.

Regarding the Six4Three Dropbox Account, we recently viewed its contents, and it appears that the documents in question have not, in fact been deleted. There are a number of folders that have been *marked* for deletion, but they have not actually been deleted. Our understanding is that these documents will not actually be deleted until some time passes or some further action is taken. We would like to unmark the folders for deletion, but we have not done so or made any changes, in light of the Court's order. We have also not opened any of the folders to confirm their contents. We would also like to change the password on the Six4Three Dropbox Account as further protection. We await further instructions from the Court in that regard.

Very truly yours,

David S. Godkin

DSG:cam

Cc: Joshua Lerner, Esq.  
Sonal Mehta, Esq.  
Laurie Miller, Esq.  
Catherine Kim, Esq.  
Service-Six4Three  
Stuart Gross, Esq.  
James E. Kruzer, Esq.

# **EXHIBIT 5**

DURIE TANGRI LLP  
SONAL N. MEHTA (SBN 222086)  
smehta@durietangri.com  
JOSHUA H. LERNER (SBN 220755)  
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ZACHARY G. F. ABRAHAMSON (SBN 310951)  
zabrahamson@durietangri.com  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant  
Facebook, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23**

**NOTICE OF SUBPOENA TO  
STUART G. GROSS**

Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015  
TRIAL DATE: April 25, 2019



1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Please take notice that, pursuant to section 2025.010 *et seq.* of the California Code of Civil  
3 Procedure, Defendant Facebook, Inc. ("Facebook") will take the deposition upon oral examination of  
4 Stuart G. Gross at the offices of Durie Tangri LLP, 217 Leidesdorff Street, San Francisco, CA 94111, on  
5 May 3, 2019, beginning at 9:00 a.m. The deposition will continue day to day, including Saturday and  
6 Sunday, until completed, pursuant to the Deposition Subpoena for Personal Appearance and Production  
7 of Documents and Things, a true and correct copy of which is attached hereto as "Exhibit A."

8 PLEASE TAKE FURTHER NOTICE that the deposition will be taken before a certified court  
9 reporter. The deposition may be recorded by videotape by a certified professional, and may be recorded  
10 by the stenographic method through the instant visual display of testimony. YOU ARE FURTHER  
11 NOTIFIED that pursuant to Code of Civil Procedure section 2025.010 *et seq.*, the deponent is required to  
12 produce on April 2, 2019 the original, or if the originals are unavailable, true, correct and legible copies,  
13 of all of the documents and tangible things identified in Exhibit A attached hereto.

14 INDIVIDUAL	DATE/TIME/LOCATION FOR DEPOSITION AND PRODUCTION	EXHIBIT
15 Stuart G. Gross	<b>Document Production Date:</b> April 2, 2019 <b>Document Repository Location:</b> Aptus Court Reporting 1 Embarcadero Ctr. #1060 San Francisco, CA 94111 <b>Deposition Date and Time:</b> May 3, 2019 at 9:00 a.m. <b>Deposition Location:</b> Durie Tangri LLP 217 Leidesdorff Street San Francisco, CA 94111	16 Exhibit A

23 Dated: March 20, 2019

DURIE TANGRI LLP

24 By: \_\_\_\_\_  
25

  
CATHERINE Y. KIM

26 Attorney for Defendant  
27 Facebook, Inc.  
28

**PROOF OF SERVICE**

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 20, 2019, I served the following documents in the manner described below:

**NOTICE OF SUBPOENA TO STUART G. GROSS**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from ckim@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross  
GROSS & KLEIN LLP  
The Embarcadero, Pier 9, Suite 100  
San Francisco, CA 94111  
sgross@grosskleinlaw.com

David S. Godkin  
James Kruzer  
BIRNBAUM & GODKIN, LLP  
280 Summer Street  
Boston, MA 02210  
godkin@birnbaumgodkin.com  
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff  
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Dea.Palumbo@wilsonelser.com

*Attorney for Gross & Klein LLP*

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csargent@computerlaw.com  
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas  
Scaramellino (individual capacities)*

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Llombard@morrisonmahoney.com

James A. Murphy  
James A. Lassart  
Thomas P Mazzucco  
Joseph Leveroni  
Murphy Pearson Bradley & Feeney  
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San Francisco, CA 94108  
JMurphy@MPBF.com  
jlassart@mpbf.com  
TMazzucco@MPBF.com  
JLeveroni@MPBF.com

*Attorney for Birnbaum & Godkin, LLP*

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct. Executed on March 20, 2019, at San Francisco, California.

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5 Catherine Y. Kim  
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# EXHIBIT A

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>DURIE TANGRI LLP, Sonal N. Mehta (SBN 222086),</b> <b>Joshua H. Lerner (SBN 220755), Laura E. Miller (SBN 271713),</b> <b>Catherine Y. Kim (SBN 308442), Zachary G. F. Abrahamson (SBN 310951)</b> <b>217 Leidesdorff Street, San Francisco, CA 94111</b> TELEPHONE NO.: <b>415-362-6666</b> FAX NO. (Optional): <b>415-236-6300</b> E-MAIL ADDRESS (Optional): <b>SERVICE-SIX4THREE@durietangri.com</b> ATTORNEY FOR (Name): <b>Defendant Facebook, Inc.</b>	FOR COURT USE ONLY
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo</b> STREET ADDRESS: <b>400 County Center, Redwood City, CA 94063</b> MAILING ADDRESS: <b>400 County Center</b> CITY AND ZIP CODE: <b>Redwood City, CA 94063</b> BRANCH NAME: <b>Southern Branch: Hall of Justice and Records</b>	
PLAINTIFF/PETITIONER: <b>Six4Three, LLC</b> DEFENDANT/RESPONDENT: <b>Facebook, Inc. et al.</b>	
<b>DEPOSITION SUBPOENA</b> <b>FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS</b>	CASE NUMBER: <b>CIV 533328</b>

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):**  
**Stuart G. Gross, Gross & Klein LLP, The Embarcadero, Pier 9, Suite 100, San Francisco, CA 94111**

**1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date: <b>May 3, 2019</b>	Time: <b>9:00 a.m.</b>	Address: <b>Durie Tangri, 217 Leidesdorff St., San Francisco, CA</b>
--------------------------	------------------------	--

- ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
  - ☒ You are ordered to produce the documents and things described in item 3.
  - ☒ This deposition will be recorded stenographically ☒ through the instant visual display of testimony and by ☐ audiotape ☒ videotape.
  - ☒ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:  
 Documents are to be produced at Aptus, 1 Embarcadero Ctr. #1060, San Francisco, CA 94111 by 4/2/19.
- ☒ Continued on Attachment 3.
4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:  
 n/a
- ☐ Continued on Attachment 4.
5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**
6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued: **March 20, 2019**

**Catherine Y. Kim**

(SIGNATURE OF PERSON ISSUING SUBPOENA)

**Attorney for Defendant Facebook, Inc.**

(TYPE OR PRINT NAME)

(Proof of service on reverse)

(TITLE)

Page 1 of 2

PLAINTIFF/PETITIONER: Six4Three, LLC

CASE NUMBER:

DEFENDANT/RESPONDENT: Facebook, Inc. et al.

CIV 533328

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE  
AND PRODUCTION OF DOCUMENTS AND THINGS**

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:
  - a. Person served (*name*):
  - b. Address where served:
  - c. Date of delivery:
  - d. Time of delivery:
  - e. Witness fees and mileage both ways (*check one*):
    - (1) ☐ were paid. Amount: ..... \$ \_\_\_\_\_
    - (2) ☐ were not paid.
    - (3) ☐ were tendered to the witness's  
public entity employer as  
required by Government Code  
section 68097.2. The amount  
tendered was (*specify*): ..... \$ \_\_\_\_\_
  - f. Fee for service: ..... \$ \_\_\_\_\_
2. I received this subpoena for service on (*date*):
3. Person serving:
  - a. ☐ Not a registered California process server
  - b. ☐ California sheriff or marshal
  - c. ☐ Registered California process server
  - d. ☐ Employee or independent contractor of a registered California process server
  - e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
  - f. ☐ Registered professional photocopier
  - g. ☐ Exempt from registration under Business and Professions Code section 22451
  - h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶

(SIGNATURE)

(For California sheriff or marshal use only)  
I certify that the foregoing is true and correct.

Date:

▶

(SIGNATURE)

# **EXHIBIT 6**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC. a Delaware corporation; MARK ZUCKERBERG, an individual; CHRISTOPHER COX, an individual; JAVIER OLIVAN, an individual; SAMUEL LESSIN, an individual; MICHAEL VERNAL, an individual; ILYA SUKHAR, an individual; and DOES 1-50, inclusive,

Defendants.

**Originating Court & Case No.:**

Superior Court of the State of  
California, County of San Mateo,  
Case No. CIV533328

**SUBPOENA *DUCES TECUM* AND *AD TESTIFICANDUM* UNDER CPLR § 3119 AND  
THE UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT**

**TO:** Thomas Scaramellino  
300 East 23<sup>rd</sup> Street, Unit 6H  
New York, New York 10010

**YOU ARE HEREBY COMMANDED** under CPLR § 3119 and the attached subpoena issued in the above-captioned case (the “California Subpoena”), the terms of which are fully incorporated herein, to appear at the offices of **Ellen Grauer Court Reporting, 126 East 56<sup>th</sup> Street, 5<sup>th</sup> Floor, New York, New York 10022** on **Monday, May 6, 2019 at 9:00 AM** to testify and give evidence at a deposition to be taken in the above-captioned civil action, which is pending in the Superior Court of the State of California, County of San Mateo (the “California Action”).

**YOU ARE FURTHER COMMANDED** under CPLR § 3119 to bring with you and produce any and all documents in your possession, custody, or control described in Attachment 3



of the California Subpoena, to the offices of **Pincus Law LLC, 90 Broad Street, 23<sup>rd</sup> Floor, New York, New York 10004** on **Friday, April 12, 2019**.

**PLEASE TAKE NOTICE** that the disclosure sought by this Subpoena and the California Subpoena is required because you are believed to have information relating to communications involving Six4Three LLC (“Six4Three”) and/or its agents or representatives, including but not limited to You, Theodore Kramer, David Godkin, James Kruzer, Birnbaum & Godkin LLP, Stuart Gross, Gross & Klein LLP; and any other individual or entity, relating to Facebook’s confidential or highly confidential information, including such information embodied in court documents, that is necessary to the ongoing investigation in the above-captioned case.

**PLEASE TAKE FURTHER NOTICE THAT** failure to comply with this *subpoena duces tecum* and *ad testificandum* will open you to liability for contempt of court, a penalty not to exceed \$50, and payment of damages to the Plaintiff caused by your failure to comply.

**PLEASE TAKE FURTHER NOTICE THAT**, under CPLR § 3119(b)(3)(ii), the following is a list of the names, addresses, telephone numbers, and email addresses of all counsel of record in the California Action:

Stuart G. Gross  
GROSS & KLEIN LLP  
The Embarcadero, Pier 9, Suite 100  
San Francisco, CA 94111  
(415) 671-4628  
[sgross@grosskleinlaw.com](mailto:sgross@grosskleinlaw.com)

David S. Godkin  
James Kruzer  
BIRNBAUM & GODKIN, LLP  
280 Summer Street  
Boston, MA 02210  
(617) 307-6100  
[godkin@birnbaumgodkin.com](mailto:godkin@birnbaumgodkin.com)

Sonal N. Mehta ([smehta@durietangri.com](mailto:smehta@durietangri.com))  
Joshua H. Lerner ([jlerner@durietangri.com](mailto:jlerner@durietangri.com))  
Laura E. Miller ([lmiller@durietangri.com](mailto:lmiller@durietangri.com))  
Catherine Y. Kim ([ckim@durietangri.com](mailto:ckim@durietangri.com))  
Zachary G.F. Abrahamson  
([zabrahamson@durietangri.com](mailto:zabrahamson@durietangri.com))  
DURIE TANGRI LLP  
217 Leidesdorff Street  
San Francisco, California 94111  
(415) 362-6666  
*Attorneys for Defendants Facebook, Inc.,  
Mark Zuckerberg, Christopher Cox, Javier  
Olivan, Samuel Lessin, Michael Vernal, and  
Ilya Sukhar*

kruzer@birnbaumgodkin.com  
*Attorneys for Plaintiff Six4Three, LLC*


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*Attorneys for Gross & Klein LLP*

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sbolotin@morrisonmahoney.com  
Llombard@morrisonmahoney.com

James A. Murphy  
James A. Lassart  
Thomas P Mazzucco  
Joseph Leveroni  
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FEENEY  
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jmurphy@mpbf.com  
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tmazzucco@mpbf.com  
jleveroni@mpbf.com  
*Attorney for Birnbaum & Godkin, LLP*

Dated: March 21, 2019

Jack Russo  
Christopher Sargent  
COMPUTERLAW GROUP, LLP  
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Palo Alto, CA 94301  
(650) 999-0972  
jrusso@computerlaw.com  
csargent@computerlaw.com  
*Attorneys for Theodore Kramer and Thomas Scaramellino*

  
Mark S. Pincus  
PINCUS LAW LLC  
90 Broad Street, 23<sup>rd</sup> Floor  
New York, New York 10004  
(212) 962-2900  
mark@pincus-law.com  
*Attorneys for Defendants Facebook, Inc.,  
Mark Zuckerberg, Christopher Cox, Javier  
Olivan, Samuel Lessin, Michael Vernal, and  
Ilya Sukhar*

**1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS** in this action at the following date, time, and place:

Date: 5/6/2019 Time: 9:00 a.m. Address: 126 E 56th St. 5th Fl., New York, NY 10022

- a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
- b. ☒ You are ordered to produce the documents and things described in item 3.
- c. ☒ This deposition will be recorded stenographically ☒ through the instant visual display of testimony and by ☐ audiotape ☒ videotape.
- d. ☒ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:  
Documents are to be produced at Pincus Law LLC, 90 Broad St., Fl. 23, New York, NY 10004 by 4/12/19.  
☒ Continued on Attachment 3.
4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:  
n/a  
☐ Continued on Attachment 4.
5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**
6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.260.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: March 21, 2019

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Catherine Y. Kim

Attorney for Defendant Facebook, Inc.

(TYPE OR PRINT NAME)

(Proof of service on reverse)

(TITLE)

Page 1 of 2

**DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE  
AND PRODUCTION OF DOCUMENTS AND THINGS**

PLAINTIFF/PETITIONER: Six4Three, LLC

CASE NUMBER:

CIV 533328

DEFENDANT/RESPONDENT: Facebook, Inc. et al.

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE  
AND PRODUCTION OF DOCUMENTS AND THINGS**

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:

a. Person served (*name*):

b. Address where served:

c. Date of delivery:

d. Time of delivery:

e. Witness fees and mileage both ways (*check one*):

(1) ☐ were paid. Amount: ..... \$ \_\_\_\_\_

(2) ☐ were not paid.

(3) ☐ were tendered to the witness's  
public entity employer as  
required by Government Code  
section 68097.2. The amount  
tendered was (*specify*): ..... \$ \_\_\_\_\_

f. Fee for service: ..... \$ \_\_\_\_\_

2. I received this subpoena for service on (*date*):

3. Person serving:

a. ☐ Not a registered California process server

b. ☐ California sheriff or marshal

c. ☐ Registered California process server

d. ☐ Employee or independent contractor of a registered California process server

e. ☐ Exempt from registration under Business and Professions Code section 22350(b)

f. ☐ Registered professional photocopier

g. ☐ Exempt from registration under Business and Professions Code section 22451

h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶

(SIGNATURE)

(For California sheriff or marshal use only)

I certify that the foregoing is true and correct.

Date:

▶

(SIGNATURE)

# **EXHIBIT 7**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

FACEBOOK, INC., a Delaware corporation,

Petitioner,

v.

DAVID GODKIN,

Respondent.

Civil Action No.: 19-910-F

**SUBPOENA AD TESTIFICANDUM**

To: David Godkin  
c/o Birnbaum & Godkin, LLP  
280 Summer Street  
Boston, MA 02210

YOU ARE HEREBY COMMANDED in the name of the Commonwealth of Massachusetts in accordance with the provisions of G.L. c. 223A, § 11 and the Massachusetts Rules of Civil Procedure 30 and 45, to appear for deposition, before a Notary Public or other individual authorized to administer oaths, at the offices of Conn Kavanaugh Rosenthal Peisch & Ford, LLP, One Federal Street, 15<sup>th</sup> floor, Boston, Massachusetts 02110 on May 2, 2019 at 9:00 a.m., and to testify as to your knowledge.

If you fail to answer this Subpoena, you will answer your default under the law as provided.

Dated: March 22, 2019

By its attorneys,



James B. Peloquin (BBO # 544168)

Daniel R. Fishman (BBO# 696748)

CONN KAVANAUGH ROSENTHAL

PEISCH & FORD, LLP

One Federal Street, 15<sup>th</sup> floor

Boston, MA 02110

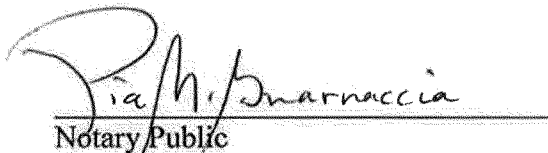
Tel.: (617) 482-8200

Fax: (617) 482-6444

jpeloquin@connkavanaugh.com

dfishman@connkavauagh.com

*Attorneys for Petitioner Facebook, Inc.*



Notary Public

My Commission expires 12/9/2022

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